

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

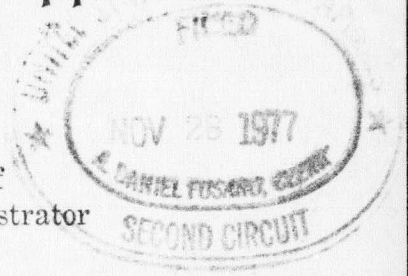
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77-6150

To be argued by
WILLIAM J. HIBSHER

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 77-6150

Matter of the Accounting of
ABRAHAM D. LEVY, As Administrator
of
the Estate of Charles Brown a/k/a
Charles W. Brown, Deceased.



STATE OF NEW YORK,
Respondent-Appellant,
UNITED STATES OF AMERICA,
Petitioner-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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STATE OF NEW YORK,
Respondent-Appellant,

UNITED STATES OF AMERICA,
Petitioner-Appellee.

APPELLEE'S BRIEF

Preliminary Statement

Appellant, State of New York, has brought this appeal from a judgment of United States District Judge John M. Cannella dated August 2, 1977 granting the United States' motion for summary judgment in a removed proceeding which sought a declaration of whether the State of New York could impose its estate tax on property which passes to the United States pursuant to 38 U.S.C. § 5220. The judgment was based on a written opinion which is reprinted as an addendum to this brief. Section 5220 provides that all of the personal property of a veteran who dies in a Veterans Administration ("VA") hospital without a will or next of kin immediately vests in the United States.

Issues Presented

1. Is the Supreme Court's decision in *United States v. Oregon*, which upheld the constitutionality of 38 U.S.C. § 5220, dispositive of the issue of the statute's constitutionality?

2. Did the District Court correctly conclude that New York State could not constitutionally impose its estate tax on property which immediately vests in the United States upon the death of a veteran pursuant to 38 U.S.C. § 5220?

3. Is property passing to the United States pursuant to 38 U.S.C. § 5220 exempt from estate taxation as a proper deduction from the decedent's gross estate?

4. Did the District Court have jurisdiction in this proceeding?

Statement of Facts

The decedent, Charles Brown, was a veteran who had served in the Navy between November, 1918 and January, 1919. He was admitted to the VA hospital in the Bronx, New York, on October 11, 1972, for treatment of a heart condition and was discharged on November 17, 1972.*

* When Mr. Brown first entered the VA hospital, he completed an Application for Medical Benefits which notified him as follows:

NOTE—The law (38 U.S.C. § 5220 *et seq.*) provides that upon the death of any veteran receiving care or treatment by the Veteran's Administration in any institution leaving no widow (widower), next of kin or heir entitled to inherit, all personal property, including money or balances in bank, and all claims and choses in action, owned by such veteran, and not disposed of by will or otherwise, will become the property of the United States as trustee for the Post Fund.

He was readmitted on March 1, 1973 and died of acute myocardial infarction on March 5, 1973, at the age of 75. Mr. Brown, who had never married, died intestate and without any next of kin entitled to inherit his property under the laws of New York, his domicile.

Abraham Levy, Bronx County Public Administrator, was appointed the administrator of decedent's estate on or about March 16, 1973. In or about April, 1974, Mr. Levy rendered his final accounting and served a citation upon the United States and the Attorney General of the State of New York to show cause why the account should not be judicially settled and allowed and why the entire balance of the estate should not be paid to the United States pursuant to 38 U.S.C. § 5220. The accounting disclosed that the Administrator had paid Federal and state estate taxes on property belonging to the United States under 38 U.S.C. § 5220.

The United States timely removed the proceeding from Surrogate's Court, Bronx County, to the District Court for the Southern District of New York for the purpose of obtaining a declaratory judgment on the issue of whether the State of New York could impose its estate tax on the decedent's property which passed to the United States under 38 U.S.C. § 5220.*

On April 8, 1975, the Internal Revenue Service (the "IRS") issued a ruling in this case that all of Mr. Brown's property passing to the United States pursuant to 38 U.S.C. § 5220 is deductible in computing any Federal estate taxes owed by the estate. On April 28, 1975, the IRS issued a revenue ruling based on the April 8, 1975 ruling in this case, declaring that in all cases in which property goes to the United States pursuant to 38 U.S.C. § 5220 such property would be deductible in computing estate taxes.

* The amount of state taxes which the administrator paid representing property which vested in the United States pursuant to 38 U.S.C. § 5220 is approximately \$85.00.

The parties herein entered into a stipulation of facts on April 27, 1976. Document No. 11, Record on Appeal. Petitioner then moved for summary judgment, and respondent cross-moved. On July 20, 1977, the District Court issued its written opinion granting the United States' motion for summary judgment, concluding that the State of New York could not impose its estate tax on property passing to the United States pursuant to 38 U.S.C. § 5220.

Relevant Statutes and Regulations

Title 38, United States Code, Veterans' Benefits

Subchapter II.—Death While Inmate of Veterans' Administration Facility

§ 5220. Vesting of property left by decedents.

(a) Whenever any veteran (admitted as a veteran) shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, next of kin, or heirs entitled, under the laws of his domicile, to his personal property as to which he dies intestate, all such property, including money and choses in action, owned by him at the time of death and not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund (hereafter in this subchapter referred to as the "Fund"), a trust fund prescribed by section 725s (a) (45) of title 31.

(b) The provisions of subsection (a) are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Veterans' Administration in a facility or hospital. The acceptance and the con-

tinued acceptance of care or treatment by any veteran (admitted as a veteran to a Veterans' Administration facility or hospital) shall constitute an acceptance of the provisions and conditions of this subchapter and have the effect of an assignment, effective at his death, of such assets in accordance with and subject to the provisions of this subchapter and regulations issued in accordance with this subchapter. (Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1259.)

§ 5221. Presumption of contract for disposition of personalty.

The fact of death of a veteran (admitted as such) in a facility or hospital, while being furnished care or treatment therein by the Veterans' Administration, leaving no spouse, next of kin, or heirs, shall give rise to a conclusive presumption of a valid contract for the disposition in accordance with this subchapter, but subject to its conditions, of all property described in section 5220 of this title owned by said decedent at death and as to which he dies intestate. (Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1260.)

§ 5226. Filing of claims for assets.

Notwithstanding the crediting to said Fund of the assets, or proceeds thereof, of any decedent, whether upon determination by a court or the Veterans' Administration pursuant to the provisions of section 5220 of this title, any person claiming a right to such assets may within five years after the death of the decedent file a claim on behalf of himself and any others claiming with the Administrator. Upon receipt of due proof that any person was at date of death of the veteran entitled to his personal property, or a part thereof, under the laws of the State of domicile of the decedent, the Administrator may pay out of the Fund, but not to exceed the net amount credited thereto from said decedent's estate less any necessary expenses, the amount to which such person, or per-

sons, was or were so entitled, and upon similar claim any assets of the decedent which shall not have been disposed of shall be delivered in kind to the parties legally entitled thereto. If any person so entitled is under legal disability at the date of death of such decedent, such five-year period of limitation shall run from the termination or removal of legal disability. In the event of doubt as to entitlement, the Administrator may cause administration or other appropriate proceedings to be instituted in any court having jurisdiction. In determining questions of fact or law involved in the adjudication of claims made under this section, no judgment, decree, or order entered in any action at law, suit in equity, or other legal proceeding of any character purporting to determine entitlement to said assets or any part thereof, shall be binding upon the United States or the Administrator or determinative of any fact or question involving entitlement to any such property or the proceeds thereof, or any part of the Fund, unless the Administrator has been seasonably served with notice and permitted to become a party to such suit or proceeding if he makes a request therefor within thirty days after such notice. Notice may be served in person or by registered mail or by certified mail upon the Administrator, or upon his authorized attorney in the State wherein the action or proceedings may be pending. Notice may be waived by the Administrator or by his authorized attorney, in which event the finding, judgment, or decree shall have the same effect as if the Administrator were a party and served with notice. Any necessary court costs or expenses if authorized by the Administrator may be paid as are other administrative expenses of the Veterans' Administration. (Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1261; Pub. L. 86-507, § 1(33), June 11, 1960, 74 Stat. 202.)

Volume 26, Code of Federal Regulations, Part 20,
Estate Tax

Treasury Regulation

§ 20.2053-4 Deduction for claims against the estate;
in general.

The amounts that may be deducted as claims against a decedent's estate are such only as represent personal obligations of the decedent existing at the time of his death, whether or not then matured, and interest thereon which had accrued at the time of death. Only interest accrued at the date of the decedent's death is allowable even though the executor elects the alternate valuation method under section 2032. Only claims enforceable against the decedent's estate may be deducted. Except as otherwise provided in § 20.2053-5 with respect to pledges or subscriptions, section 2053(c)(1)(A) provides that the allowance of a deduction for a claim founded upon a promise or agreement is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. See § 20.2043-1. Liabilities imposed by law or arising out of torts are deductible.

Treasury Regulation

§ 20.2053-5 Deductions for charitable, etc., pledges or
subscriptions.

A pledge or a subscription, evidenced by a promissory note or otherwise, even though enforceable against the estate, is deductible only to the extent that—

(a) Liability therefor was contracted bona fide and for an adequate and full consideration in cash or its equivalent, or

(b) It would have constituted an allowable deduction under section 2055 (relating to charitable, etc., deductions) if it had been a bequest.

New York Tax Law, Article 26—Estate Tax

§ 955. Resident's New York estate tax deductions

(a) General.—The New York estate tax deductions for the estate of a deceased resident mean the deductions from his federal gross estate allowable in determining his federal taxable estate under the internal revenue code (whether or not a federal estate tax return is required to be filed), exclusive of the sixty-thousand dollar exemption under section two thousand fifty-two of the internal revenue code, . . .

§ 961. Effect of federal determination

(a) General.—A final federal determination as to

(1) the inclusion in the federal gross estate of any item of property or interest in property,

(2) the allowance of any item claimed as a deduction from the federal gross estate, or

(3) the value or amount of any such item, shall also determine the same issue for purposes of the tax under this article unless such final federal determination is shown by a preponderance of the evidence to be erroneous. * * *

ARGUMENT

POINT I

Section 5220 Is Constitutional: *United States v. Oregon.*

Despite the clear language of section 5220 and the statute it amended,* states have repeatedly attempted to have the property which section 5220 directs to the General Post Fund pass instead into the states' treasuries. These attempts have been by way of constitutional attack and, as seen here, by way of taxing the property which could not be obtained directly. Courts, including the Supreme Court of the United States, have repeatedly rejected the constitutional attacks and held that the United States is entitled to the property. *United States v. Oregon*, 366 U.S. 643 (1961); *United States v. Stevens*,

* The 1910 statute which section 5220 amended reads as follows:

Hereinafter the application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home . . . and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. . . . (36 Stat. 736).

302 U.S. 623 (1938) ; *In re Skriziszouski's Estate*, 382 Pa. 634, 116 A.2d 841 (Pa. 1955) ; *In re Estate of Rodger's* 60 Misc. 2d 769, 303 N.Y.S.2d 551 (Sur. Ct. Erie Co. 1969). Appellant, nevertheless, attacks the constitutionality of section 5220 and asks this Court to reconsider the issue anew.

In 1961, the Supreme Court, examining the statute that is now 38 U.S.C. § 5220(a), specifically and unequivocally upheld its constitutionality: "[T]his statute does not violate the Tenth Amendment." *United States v. Oregon*, *supra*, 366 U.S. at 645. Appellant has not nor could it cite to any Supreme Court case which criticizes or casts doubt on the decision upholding the constitutionality of section 5220 in *United States v. Oregon*. Appellant has not cited a single case at any level which deviates from or criticizes that decision. Instead, appellant argues that one recent Supreme Court decision has inferentially overruled *United States v. Oregon*. (Appellant's Brief at 8). Appellant is wrong.

A. The Supreme Court Has Specifically Declared Section 5220 to be Constitutional.

In *United States v. Oregon*, the State of Oregon asserted a claim under its escheat law to property left by an Oregon resident who died without a will or heirs. The Oregon resident, a veteran, died in a VA hospital. The Supreme Court of Oregon—which required that the veteran execute a written contract at the time of his admission to the VA hospital for the statute to be operative—held that the decedent had been incompetent to validly contract, and that the state, not the General Post Fund, was entitled to the decedent's property. 222 Ore. 40, 352 P.2d 539 (1960). The United States Supreme Court reversed, holding that the statute did not require the execution of a contract by the decedent and, while

recognizing that escheat is traditionally governed by state law, held that the statute was derivative of a proper exercise of Congressional power—the power to raise armies. The Court stated,

We see no merit in the challenge to the constitutionality of § 1 [now section 5220(a)] as construed in this natural manner. Congress undoubtedly has the power—under its constitutional powers to raise armies and navies and to conduct wars—to pay pensions, and to build hospitals and homes for veterans. We think it plain that the same sources of power authorize Congress to require that the personal property left by its wards when they die in government facilities shall be devoted to the comfort and recreation of other ex-service people who must depend upon the Government for care. The fact that this law pertains to the devolution of property does not render it invalid. *Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power.*

366 U.S. at 648-49 (footnotes omitted) (emphasis added).

Appellant urges this Court to declare section 5220 unconstitutional as it applies to non-VA derived assets. But *Oregon* involved non-VA derived assets—money which the veteran had inherited from his brother, and the Supreme Court upheld the statute. Section 5220 was clearly intended to apply to all personal property owned by the veteran at death,* VA-derived or not, when he

* The 1910 statute which section 5220 amended, stated that the subject property included all personal property left by the veteran “whether such property be the proceeds of pensions or otherwise derived, . . .”

dies in a VA hospital and can therefore be presumed to have benefited from VA care.

B. Section 5220 Does Not Displace Any Integral State Function.

Other than the reasoning of the dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Whittaker, in *United States v. Oregon*, *supra*, appellant cites one Supreme Court decision in support of its position that section 5220 has been inferentially deemed unconstitutional. That case, *National League of Cities v. Usery*, 426 U.S. 833 (1976), is inapposite.

In *National League*, the Supreme Court struck down amendments to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, the effect of which, the Court said, would have been to "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, public health, and parks and recreation." 426 U.S. at 851. The amendments struck down in *National League* would have extended Federal minimum wage and maximum hour provisions to most state and municipal employees. The condemned amendments were deemed to "operate to directly displace the States' freedom to structure *integral operations* in areas of traditional government functions, . . ." 426 U.S. at 852 (emphasis added). The Court concluded that Congress could not exercise its Commerce Clause powers to restrict essential state functions:

States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. . . . Congress may not exercise that

power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.

426 U.S. at 854-55 (footnote omitted). *National League* is inapplicable here for two reasons: 1) the condemned statute there was enacted pursuant to the Commerce Clause; and 2) escheat is hardly an integral operation of state government.

In its brief at page 8, appellant concedes that the fire and police departments, the focus of *National League*, are integral state operations, but argues that a state's right to provide for escheat is also essential in light of the financial plight in which many states find themselves. Such reasoning—the vagaries of financial difficulties which New York State may experience—cannot form the basis of judicial interference with a Federal enactment. Unlike the condemned amendments in *National League*, section 5220 does not impose any additional financial burdens on states. Furthermore, the function of escheat is not an operation of government at all and clearly not so fundamental as fire and police protection.

More basic than the obvious distinctions between the kinds of state operations which *National League* protected from Federal interference and the issue here is the fact that the condemned amendments in *National League* derived their source of power from the broad umbrella of the Commerce Clause. Art. I, § 8, cl. 1. See *National League*, *supra*, 426 U.S. at 852 n.17. The instant statute, as the Supreme Court stated in *United States v. Oregon*, *supra*, 366 U.S. at 649, is valid under Congress' power to raise armies. Art. I, § 8, cl. 11. See *Case v. Bowles*, 327 U.S. 92, 101-02 (1946).

Appellant finally argues that Mr. Brown was entitled to free care as a matter of right and that any requirement that his property pass to the General Post Fund is unjustified. (Appellant's Brief at 9). This argument ignores the basic purpose of escheat: the law of escheat provides that where an individual dies without heirs or next of kin his property passes to the public treasury for the benefit of all. With section 5220, Congress has determined that rather than escheat to the state treasury, the personal property of a veteran who dies in and has been cared for by a VA hospital—and which property is undisposed of by will or the intestacy laws of his domicile—passes to the General Post Fund for the benefit of other veterans.

Congress was certainly mindful that in enacting the statute, states' treasuries would thereby be deprived of certain enrichments. The Supreme Court, upholding that enactment, stated its reasons as follows:

The congressional plan here is that whatever little personal property veterans without wills or kin happen to leave when they die in veterans' homes and hospitals should be paid into the General Post Fund, to be used for the recreation and pleasure of other ex-service men and women who have to spend their days in veterans' homes and hospitals. This idea was expressed by Representative Jennings during the discussion of the 1941 Act on the floor of the House: "And would it not be much better to let that money go into a fund that would inure to the benefit of other veterans than to let . . . it go into a fund under the escheat laws of [a] State?"

United States v. Oregon, *supra*, 366 U.S. at 647-48 (footnote omitted). The constitutionality of section 5220 has been upheld in *United States v. Oregon*; nothing that appellant has cited detracts from that decision.

POINT II

All Of A Veteran's Personal Property Immediately Vests Upon His Death In The United States By Operation Of Federal Law And Is Intentionally Exempt From State Taxation.

It is clear from the face of section 5220 that state and local governments are not to receive any portion of a veteran's property which passes under that statute to the General Post Fund: "[A]ll such property, including money and choses in action, owned by him at the time of his death . . . *shall immediately vest in* and become the property of the United States as trustee. . . ." 38 U.S.C. § 5220(a) (emphasis added). There is no ambiguity in the statute. "All" of the subject property means all. "Shall immediately vest in" renders the statute indisputably clear.

A. The Property Passes By Operation of Federal Law and Immediately Vests in the United States.

Judge Cannella dismissed the state's contentions in short order. The statutory language "immediately vests in" was found to be unequivocal and controlling. Judge Cannella held,

The Government's position, found compelling by the Court is that decedent's property vested in the United States immediately upon his death. Any taxation of it would therefore be state taxation of federal property, a result prohibited by *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819).

Addendum at 5a.

1. States May Not Tax Federal Property.

The District Court's conclusion adheres to a long line of Supreme Court cases since *McCulloch v. Maryland*. The principle of tax immunity relied on by the District Court is so firmly established that the Supreme Court stated in *United States v. Allegheny County*, 322 U.S. 174, 177 (1944), that it was an "unshaken, rarely questioned . . . principle that possessions, institutions, and activities of the Federal Government itself in the absence of Congressional consent are not subject to taxation." In *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 561-62 (1946), the Court stated the rule as follows:

The Supremacy of the Federal Government in our Union forbids the acknowledgement of the power of any State to tax property of the United States against its will. Under an implied constitutional immunity, its property and operations must be exempt from state control in tax, as in other matters.

See Weston v. City of Charleston, 27 U.S. (2 Peters) 443, 465 (1829).

Judge Cannella correctly concluded that the veteran's personal property "immediately vested in" the United States upon his death and as property of the United States could not be taxed by New York State.

This result is supported by examining New York's own estate tax. As the New York Court of Appeals said in *Matter of Vanderbilt*, 281 N.Y. 297, 311, 315, 22 N.E.2d 379 (1939) *aff'd sub nom.*, *Whitney v. State Tax Commission*, 309 U.S. 530 (1940), an estate tax is a tax on a person's privilege of transmitting property upon his death.* Thus, where a person wills his property to the

* The language of New York's taxing provision makes it clear that the tax is imposed on the "transfer of the New York taxable estate." N.Y. Tax Law § 952(a).

United States, or to any other person or entity, courts have held that state estate taxes are applicable since the testator exercises a right to devise property by will, a statutory privilege subject to whatever conditions a state may impose. *United States v. Burnison*, 339 U.S. 87 (1950); *United States v. Perkins*, 163 U.S. 625 (1896); *United States v. Fox*, 94 U.S. 315 (1876).

Finally, any reliance by appellant on the New York Court of Appeals 4 to 3 decision in *Matter of O'Brine*, 37 N.Y.2d 81, 371 N.Y.S.2d 453, 332 N.E.2d 326 (1975) is misplaced as that case upheld imposition of New York's estate tax on property which passed under a significantly different statute, 38 U.S.C. § 3202(e), and is therefore, not on point and certainly not controlling. Section 3202 (e)* provides that under certain circumstances property which "would escheat to the State, shall escheat to the United States"; the New York court concluded that under applicable New York statutes there is no deduction permitted for property which escheats, either to the state or Federal governments. 37 N.Y.2d at 87. The result in *O'Brine* is, appellee submits, in error. The three dissenting judges correctly state the law:

* Section 3202(e) of 38 U.S.C. reads as follows:

Any funds in the hands of a guardian, curator, conservator, or person legally vested with the care of the beneficiary or his estate, derived from benefits payable under laws administered by the Veterans' Administration, which under the law of the State wherein the beneficiary had his last legal residence would escheat to the State, shall escheat to the United States and shall be returned by such guardian, curator, conservator, or person legally vested with the care of the beneficiary or his estate, or by the personal representative of the deceased beneficiary, less legal expenses of any administration necessary to determine that an escheat is in order to the Veterans' Administration, and shall be deposited to the credit of the applicable revolving fund, trust fund, or appropriation.

In the instant case when the decedent passed, without heirs, the money reverted to the United States pursuant to subdivision (e) of section 3202 of the U.S. Code leaving nothing that was transferable by him. This being the case, no basis exists for imposition of an estate tax predicated upon a "transfer." (Tax Law, § 952).

37 N.Y.2d at 88 (dissenting opinion).

The four judges constituting the majority in *O'Brine* relied on section 2222 of New York's Surrogate's Court Procedure Act ("SCPA"),* for their conclusion that only the after-tax "distributive share" reverted to the United States under 38 U.S.C. § 3202. 37 N.Y.2d at 85. Whether or not New York's Court of Appeals correctly decided *O'Brine*, it is quite clear that SCPA § 2222 does not apply to the instant case as stated in the 1970 Supplementary Practice Commentaries to that section by Allan R. Lipman:

This section does not apply to personal property owned by a veteran who at the time of his death is a patient in a Veterans' Administration Hospital. Under 38 U.S.C.A. § 5220(a), whenever a veteran dies while a patient in a veterans' hospital and leaves no survivors or heirs entitled to

* Section 2222 of New York's SCPA reads, in relevant part, as follows:

1. Where the person entitled to a legacy or distributive share is unknown the decree must direct the fiduciary to pay the amount thereof to the comptroller of the state for the benefit of the person or persons who may thereafter appear to be entitled thereto. * * *

the personal property as to which he dies intestate, all such property immediately vests in and becomes the property of the United States as trustee.

Thus, the official New York commentaries to the statute relied on by the majority in *O'Brine* expressly states that SCPA § 2222 is inapplicable to 38 U.S.C. § 5220, not considered in *O'Brine*. *Matter of O'Brine*, not controlling here and inapposite, lends dubious support to appellant's position.

2. A Bequest of Property is Unlike the Instant Vesting.

Matter of Merriam, 141 N.Y. 479, 36 N.E. 505 (1894) *aff'd sub nom.*, *United States v. Perkins*, 163 U.S. 625 (1896), relied on so strongly by appellant, (Appellant's Brief at 9-10), is inapposite as that case upheld the imposition of an inheritance tax on a bequest to the United States. The Supreme Court in *United States v. Perkins*, emphasized that the tax upheld there was on a decedent's power to bequeath:

[T]he so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; . . . Thus the tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, . . .

Appellant cites a line of cases which uphold a state's right to impose its inheritance tax upon the transfer of assets by bequest. (Appellant's Brief at 9-10). The property here, however, passes not by a testator's express wish, not by the exercise of a testamentary power controlled by state law, but by operation of Federal law which mandates immediate vesting in the United States at the moment of death.

Appellant also relies on *United States Trust Co. v. Helvering*, 307 U.S. 57 (1939), in which the Supreme Court held that War Risk Insurance Policy proceeds were properly included in a veteran's gross estate; appellant quotes language from that case to the effect that an estate tax is imposed on the transfer of property at death. (Appellant's Brief at 10-11). *United States Trust Co.* is as inapplicable as those cases which uphold a state's right to tax bequests to the United States. A veteran designates the beneficiary of his War Risk Policy, and again it is this affirmative act of transferring assets to a named beneficiary which causes the transfer of the property. 307 U.S. at 60.

Judge Cannella correctly declared the impropriety of New York's estate tax here, concluding as follows:

Such a tax would not be a tax on decedent's right to transfer his property on his death, for the property passed to the Federal Government not by bequest but by operation of federal law.

Addendum at 5a.

B. The Intent of The Statute Is That All of the Veteran's Property Pass to the United States.

The intent of Congress in enacting section 5220 was that the General Post fund would acquire "whatever little personal property" is left by a veteran who dies in VA hospitals without a will or heirs. *United States v. Oregon*, *supra*, 366 U.S. at 647. In enacting section 5220, Congress was certainly aware that property which would otherwise pass to the states under the laws of escheat would instead vest immediately in the United States.

The first comprehensive enactment of this provision was contained in the Act of June 25, 1910 [ch. 384 § 1,

36 Stat. 736 (24 U.S.C. § 136)]. The statute underwent some change and considerable expansion in 1941 [Act of December 26, 1941, ch. 634, 55 Stat. 868 (38 U.S.C. §§ 17-17j)]. Both predecessor statutes, the Act of 1910 and the 1941 amendment thereto, provided for the immediate vesting of undisposed personal property upon the veteran's death, unsurvived by heirs. Prior to the enactment of section 5520 Congress found that a number of veterans were dying in VA hospitals without having left a will or any next of kin. 87 Cong. Rec. at 5203. Personal property left by these veterans passed to the states by escheat, and to avoid this escheat, Congress enacted what is presently section 5220, creating in the United States a contractual interest in all the personal property of such veterans. The intent of section 5220 is that the veteran is free to dispose of his personal property as he sees fit, but failing to do so, the property passes to the United States for the benefit of the General Post Fund. Cf. *Abbott v. Morgenthau*, 93 F.2d 242 (D.C. Cir. 1937).

The Statute is designed so as to prevent any benefit passing to the state by way of an escheat. If the state were permitted, by taxation or otherwise, to receive any part of this property, it would frustrate the purpose and policy underlying this Statute. Congressman Jennings expressed Congress' intent during the House debate on section 5220 when he posed the following question:

And would it not be much better to let that money go into a fund that would inure to the benefit of other veterans than to let . . . it go into a fund under the escheat laws of [a] State?

87 Cong. Rec. 5203-04.

To permit the State of New York to collect an estate tax on the subject property would thwart section 5220. If state estate taxation were permitted, what would prevent a state from taking 25 percent or 50 percent of property by way of an estate tax, thereby defeating the

statute which by its terms is designed to displace states' escheat laws? But appellant argues, nevertheless, that when Congress enacted a law which says "all" that the legislative history to that statute suggests less than all was intended. Appellant may not rely on legislative history to vary the plain meaning of this statute and is, furthermore, wrong as to its contended interpretation.

C. Legislative History is Irrelevant Here and Inconclusive Upon Examination.

Appellant argues that the legislative history to section 5220 evidences the Congressional intention that state estate taxes were intended to be paid on property vesting in the United States under the statute. Ironically, the very decision which upheld the constitutionality of section 5220 is also a leading Supreme Court case on when to seek guidance from legislative history. Simply stated, the rule is that legislative history is irrelevant where it seeks to vary the plain meaning of the statute.

Having concluded that the provisions of § 1 [38 U.S.C. § 5520(a)] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act.

United States v. Oregon, *supra*, 366 U.S. at 648 (footnote omitted.) The statute under consideration in *United States v. Oregon* is the same statute before this Court. This Circuit stated the rule that legislative history need not be examined in cases like this as follows:

In our opinion, however, the provisions of [the statute] are perfectly clear. It must be assumed "that the legislative purpose is expressed by the ordinary meaning" of words used in the statute, . . . and where they have a basic and usual sense, they require no resort to legislative history. *United States v. Oregon*, 366 U.S. 643 (1961).

United States v. Blasius, 397 F.2d 203, 205-206 (2d Cir. 1968), *petition for cert. dismissed*, 393 U.S. 1008 (1969). See *American Telephone & Telegraph v. F.C.C.*, 503 F.2d 612 (2d Cir. 1974).

Furthermore, examination of the legislative history of section 5220 lends little support for appellant's position that this Court should disregard the plain meaning of the statute. Appellant cites an exchange between Congressman Elston and Congressman Rankin in the debate in the House of Representatives on this bill. The exchange, as quoted by appellant, was as follows:

MR. ELSTON. Is there anything that might be construed to dispense with the administration of an estate and the payment of taxes?

MR. RANKIN of Mississippi. No; I do not think so, where a veteran makes this agreement when he enters the hospital. If he has much of an estate, he will not go to the hospital. He will take care of himself. But where he goes to the hospital and signs this agreement, of course, when he dies his property is disposed of in the way provided in this bill.

87 Cong. Rec. at 5203.

Mr. Rankin's answer is anything but clear. While he starts his answer with the word "no," the rest of the answer is not responsive to the question. It is based on this response that appellant seeks to persuade this Court that the word "all" in the statute means less than all.

This kind of argument was specifically rejected in *United States v. Oregon* where the State of Oregon cited another statement by Congressman Rankin in the same debate during which he stated that section 5220 would not apply to insane veterans who were incompetent to

make contracts for the proposition that the decedent could not have contracted to have his property pass to the United States. Congressman Rankin had stated his views on the competency issue as follows:

[T]he veteran agrees to this arrangement when he enters the hospital. The only exception would be where the veteran is insane. His agreement would not amount to anything in that instance.

87 Cong. Rec. at 5203.

In spite of this unambiguous statement, the Supreme Court rejected Oregon's proffer of legislative history as contrary to the face of section 5220. The Court held that section 5220 did not require an executed contract to be effective even where the decedent was insane:

It is true, as the State points out, that Representative Rankin, as Chairman of the Committee handling the bill on the floor of the House, expressed his view during the course of discussion of the bill on the floor that the 1941 Act would not apply to insane veterans incompetent to make valid contracts. *But such statements, even when they stand alone, have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute.*

366 U.S. at 648 (footnotes omitted) (emphasis added).

Thus, in *United States v. Oregon*, where Congressman Rankin's statements during the debate were unambiguous, the Court rejected the state's reliance on them. Here, appellant relies on a single "no" by Congressman Rankin which was followed by an ambiguous response to undermine the clear meaning of the statute which states that *all* of the veteran's property passes to the United States at the moment of death; this Court should also reject this argument.

POINT III

Funds Passing To The United States Under Section 5220 Are Deductible From The Decedent's Gross Estate And Are Not Taxable Under Federal And New York State Estate Tax Laws.

The District Court based its decision that New York could not constitutionally impose its estate tax on property passing to the United States pursuant to 38 U.S.C. § 5220 on the immediate vesting provision of that statute and on the principle that a state may not tax property belonging to the United States. Appellant correctly notes that Judge Cannella did not adopt appellee's alternate argument—that estate taxation is improper as the property is deductible from the gross estate. The District Court stated,

On April 8, 1975 the Internal Revenue Service ("IRS") ruled that decedent's property vesting in the United States was deductible from decedent's gross estate for federal estate tax purposes pursuant to 26 U.S.C. § 2053. The United States maintains that this is the correct result. However, in that this section merely makes state law applicable to federal estate taxation with respect to certain deductions, the Court fails to see and the Government has made no attempt to explain, how such section is applicable to the case at bar.

Addendum at 4a (footnote omitted).

We submit that the above excerpt from Judge Cannella's opinion reveals a misunderstanding as to the United States' alternate argument. Though Federal estate tax law adopts state law for certain considerations, 26 U.S.C. § 2053, New York's law closely parallels the Federal law and specifically adopts Federal estate tax law with respect to deductions and exemptions. Thus,

if this property were exempt from Federal taxation, it would be exempt from state taxation as well.

A. New York Adopts Federal Estate Tax Deductions.

New York's estate tax law, consisting of only 12 sections, 951 through 963, of New York's Tax Law, essentially incorporates Federal estate tax law except to impose different tax rates. Section 955(a) provides, with certain exceptions not relevant here, that deductions from the gross estate for Federal estate tax purposes are also deductions for New York State estate tax purposes. It reads in relevant part as follows:

The New York estate tax deductions for the estate of a deceased resident mean the deductions from his federal gross estate allowable in determining his federal taxable estate under the internal revenue code (whether or not a federal estate tax return is required to be filed). . . ."

Section 961(a) of the same law provides that a final Federal determination of what constitutes a deduction from a gross estate shall also bind the state. It reads as follows:

A final federal determination as to

(1) the inclusion in the federal gross estate of any item of property or interest in property,

(2) the allowance of any item claimed as a deduction from the federal gross estate, or

(3) the value or amount of any item, shall also determine the same issue for purposes of the tax under this article unless such final federal determination is shown by a preponderance of the evidence to be erroneous.

Here, there have been two such determinations—the IRS has ruled via two revenue rulings that the subject property is deductible—these determinations are not erroneous and must be followed by New York.

B. The Property is Exempt From Federal Taxation and is Therefore Exempt from New York Taxation.

The property in question is exempt from Federal estate taxation under two separate Treasury Regulations: 1) it is exempt as a charitable pledge pursuant to Treasury Regulation § 20.2053-5; and 2) it is exempt as a claim against the estate under Treasury Regulation § 20.2053-4. Though appellant cites to the 1976 Revenue Ruling No. 76-542, 1976-2 IRB 282, which upholds an estate tax deduction for property passing to the United States pursuant to 38 U.S.C. § 5220 under Treasury Regulation § 20.2053-4, (Appellant's Brief at 15), appellant fails to cite the 1975 Revenue Ruling, No. 75-533, 1975-2 IRB 359, which arose from a requested interpretation in this case and concluded that the property was also deductible under Treasury Regulation § 20.2053-5. Thus, two Revenue Rulings grant a deduction, and New York law requires that the State follow these "final federal determination[s]" unless they are "shown by a preponderance of the evidence to be erroneous." N.Y. Tax Law § 961(a)(3).

1. Revenue Ruling 75-533 Allows a Charitable Deduction.

On April 8, 1975, the IRS rendered a ruling, based on Treasury Regulation § 20.2053-5, that all property going to the United States in this proceeding pursuant to section 5220 was deductible from the decedent's gross estate for Federal estate tax purposes under section 2053 of the

Internal Revenue Code, 26 U.S.C. § 2053. On April 28, 1975, the IRS issued a similar ruling intended to cover all present and future cases under 38 U.S.C. § 5220.

Revenue Ruling 75-533, 1975-2 IRB 359, 361 reads in pertinent part as follows:

[S]ection 20.2053-5 of the regulations allows a deduction for a charitable pledge or subscription under section (a) to the extent that there is adequate and full consideration in cash or its equivalent, and under subsection (b) if a deduction would have been allowable under section 2005 of the Code if there had been a bequest. Pursuant to the provisions of 38 U.S.C. 5220(b), an agreement is presumed in which, in return for care or treatment, the veteran promised to assign the veteran's personal property to the United States for the sole use of the General Post Fund if the veteran should die intestate and without legal heirs while in a Veterans Administration facility. Thus, the decedent's property is deemed to have been pledged to the United States for exclusively public purposes.

Accordingly, a deduction is allowable under section 2053 of the Code pursuant to section 20.2053-5 of the regulations for the value of the decedent's personal property that passed to the United States for the use of the General Post Fund. Since the value of all the personal property is deductible under the combination of subsections (a) and (b) of section 20.2053-5, it is unnecessary to determine what portion of the value of the personal property is deductible under each subsection.

Revenue Ruling 75-533 correctly concludes that the property is deductible under Treasury Regulation §20.2053-5 which permits a charitable deduction as such is defined in Treasury Regulation § 20.2053. Property passing to the United States for the benefit of the General

Post Fund, clearly a public-purpose activity of the United States—undisputed by appellant—is deductible under section 2055(a)(1) of the Internal Revenue Code. 26 U.S.C. § 2055(a)(1); Treas. Reg. § 20.2055-1(a)(1).

Without referring to the revenue ruling, appellant argues that the necessary contract is absent because while the decedent signed an Application for Medical Benefits (VA Form 10-10) when he first entered the hospital, he never signed one when he was readmitted several months later. (Appellant's Brief at 16). The fallacy in this argument is its presumption that for there to be a contract the decedent had to sign some writing. However, 38 U.S.C. § 5221 specifically establishes a conclusive presumption of contract whether or not there is a writing, and the Supreme Court has expressly upheld Congress' power to establish such a conclusive presumption. *United States v. Stevens*, *supra*; *United States v. Oregon*, *supra*. Section 5221 provides as follows:

The fact of death of a veteran (admitted as such) in a facility or hospital, while being furnished care or treatment therein by the Veterans' Administration, leaving no spouse, next of kin, or heirs, shall give rise to a conclusive presumption of a valid contract for the disposition in accordance with this subchapter, but subject to its conditions, of all property described in section 5220 of this title owned by said decedent at death and as to which he dies intestate.*

* Furthermore, Mr. Brown can be presumed to have been aware of this rule of law by virtue of the fact that he signed, several months prior to his death, an application for medical benefits which contained a summary of section 5220. Notice must also be given by posting the applicable provisions in a prominent place in each building wherein patients are housed. 38 C.F.R. § 12.20.

Treasury Regulation § 20.2053-5(b) permits a deduction for property which passes by virtue of a "pledge or a subscription" if "[i]t would have constituted an allowable deduction under section 2055 . . . if it had been a bequest." The presumption of a contract here establishes the necessary pledge; the General Post Fund clearly qualifies for a section 2055 deduction.

2. Revenue Ruling 76-542 Allows a Deduction as a Claim.

Revenue Ruling 76-542, 1976-2 IRB 282, states that property passing to the United States under 38 U.S.C. § 5220 is properly deductible for estate tax purposes under Treasury Regulation § 20.2053-4 as a liability imposed by law. The ruling reads in pertinent part as follows:

[S]ection 20.2053-4 of the regulations provides that "[l]iabilities imposed by law or arising out of torts are deductible." The concept of allowing a deduction for a liability imposed by law was first incorporated into the regulations by Article 36 of Regulations 80. The regulation was designed to reflect the following statement in the committee report that accompanied the bill later enacted as the Revenue Act of 1932, such statement dealing with the intent of section 805 of the Act, a predecessor section 2053(c)(1)(A) of the code:

"(4) A clarifying provision limiting the requirement of an adequate and full consideration in money or money's worth to liabilities founded on contract. The existing law might be open to a construction under which no claim against the estate would be deductible unless supported by an "adequate and full consideration in money or money's worth," but the real intent could hardly have been to deny the deduction of liabilities imposed by law or arising out of torts, and the

amendment whereby the requirement of a consideration applies only where the liability is founded on contract is designed to clear up any doubt which may be thought to exist." [S. Rep. No. 655, 72nd Cong., 1st Sess. 51 1932, 1939-1 (Part 2) C.B. 491; accord, H.R. Rep. No. 708, 72nd Cong., 1st Sess. 48 (1932), 1939-1 (Part 2) C.B. 533.]

The contractual language of 38 U.S.C. 5220(b) and 5211 provides an alternative basis for the passing of the decedent's property to the United States; under 38 U.S.C. 5220(a) (1970), the obligation is imposed solely by law, without any requirement of a contract or agreement. *United States v. Oregon*, 366 U.S. 643 (1961).

1976-2 IRB at 283-84.

Appellant argues that there can be no "liability imposed by law"—as Revenue Ruling 76-542 deems section 5220 to impose—because section 5220 is a "custody" escheat and the VA holds the property as trustee (Appellant's Brief at 15). Appellant correctly notes that heirs who may have been entitled to property which vests in the United States pursuant to section 5220 are not without remedies if they later appear. Appellant is incorrect, however, when it states that property is to "be held forever available to heirs who come forward to claim it at any time." (Appellant's Brief at 15). Section 5226 provides that an heir may file a claim within five years after the veteran's death and the VA may pay that claim, if valid. Furthermore, though the United States is a trustee of the property for the benefit of the General Post Fund, the United States is not a trustee for potential heirs. The statute provides that the property immediately vests in the United States upon the veteran's death, the possibility that an heir may appear to file a claim does not render the VA a trustee. If a valid claim is made within five years, that claim is paid.

C. The State Has Not Met its Burden of Showing the Revenue Rulings to be Erroneous.

The two revenue rulings which hold that property passing to the United States under 38 U.S.C. § 5220 are deductible from the gross estate are entitled to great deference as this Court recently stated in *Nico v. Commissioner of Internal Revenue*, Dkt. No. 77-4090, slip op. 365, 369 (2d Cir., Nov. 15, 1977):

[T]he Commissioner contends that great deference should be given to the rulings of the Internal Service which is charged with administration of the statute, and that these rulings should be sustained even though there may be another reasonable reading which the court might think preferable. *United States v. Correll*, 389 U.S. 299, 306-07 (1967); *Commissioner v. Stidger*, 386 U.S. 287, 296 (1967). We of course, agree with this principle.

Appellant has not met its burden under its own law, New York Tax Law § 961(a), of showing that these rulings are clearly erroneous. In *Matter of Kahn*, 48 App. Div.2d 880, 369 N.Y.S.2d 198 (2d Dep't 1975), New York's Appellate Division held that the New York State Tax Commission had to abide by the IRS's determination that certain property was deductible under Federal State tax law in applying New York's estate tax:

That determination by the District Director on behalf of the United States Treasury Department was binding on appellant as to the New York estate tax, unless appellant could establish by a preponderance of evidence that the Federal determination was clearly erroneous (Tax Law, §§ 955, 961; *Matter of Behm*, 19 A.D.2d 234, 241 N.Y.S.2d 264, affd. 14 N.Y.2d 826, 251 N.Y.S.2d 475, 200

N.E.2d 457; Matter of Tricarico, 68 Misc.2d 1018, 329 N.Y.S.2d 42). We agree with the Surrogate that appellant has not met that burden.

369 N.Y.S. 2d at 200.

It therefore follows that all property going to the United States in the present action under section 5220 is deductible from the decedent's gross estate under Federal law and under New York's own laws. The practical effect of this is that no New York estate tax is owed on this property.

POINT IV

The District Court Properly Exercised Jurisdiction In This Proceeding.

The State argues that the District Court should have declined jurisdiction and should have remanded this proceeding to the Surrogate's Court for a determination of the United States' contentions. The State does not contest the propriety of removal pursuant to 28 U.S.C. §§ 1441 and 1446, but argues instead that the District Court improperly exercised jurisdiction in light of the anti-injunction statute, 28 U.S.C. § 1341, and the abstention doctrine.

Judge Cannella noted that the Government did not seek injunctive relief, (Addendum at 3a); what was sought was a declaration of the state's right to tax property which passes to the United States pursuant to 38 U.S.C. § 5220. The District Court remanded the case to the Surrogate's Court following its declaration that the State could not tax property passing to the United States pursuant to section 5220. (Appendix at 4a-5a).

A. Section 1341 Does Not Bar Jurisdiction.

Section 1341, of 28 U.S.C. precludes a Federal district court from enjoining the collection of state tax where a speedy remedy is available in the state courts. That section is inapplicable here for two reasons: 1) the United States has never sought, nor did the District Court grant, an injunction; and 2) even if an injunction had been sought—or if the anti-injunction statute is interpreted to include declaratory actions—that statute does not apply to the United States as a party.

In *Department of Employment v. United States*, 385 U.S. 355, 358 (1966), the Supreme Court rejected Colorado's invocation of 28 U.S.C. § 1341 as a barrier to Federal jurisdiction. The Court affirmed a three-judge court's holding that Colorado's imposition of its unemployment compensation tax on wages paid to Colorado residents by the American National Red Cross was impermissible as the Red Cross was exempt from state taxation as an instrumentality of the Federal government. The Court stated,

[W]e conclude, in accord with an unbroken line of authority and convincing evidence of legislative purpose, that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions.

385 U.S. at 358 (footnotes omitted). Cf. *Letter Minerals, Inc. v. United States*, 352 U.S. 220, 225-26 (1957).

Department of Employment v. United States was in accord with this Circuit's view that section 1341 does not apply to the United States. In *United States v. Woodworth*, 170 F.2d 1019, 1020 (2d Cir. 1948), an action by the United States to enjoin the collection of a New York State tax by the City Assessor of Rochester, this Court stated as follows:

We think Congress did not intend this statutory provision [the anti-injunction statute] added by amendment in 1937, to apply to the United States which was not specifically named therein. (Citations omitted.)

Appellant relies on *United States v. City of New York*, 175 F.2d 75 (2d Cir. 1949), as support for its contention that the District Court was without jurisdiction here. Reliance on *United States v. City of New York* is misplaced as that case relied on the abstention doctrine, not the absolute bar to jurisdiction mandated in section 1341, and cited *United States v. Woodworth* with approval. As will be seen below, the abstention doctrine does not apply here.

B. Abstention Is Not Required Where There Are Clear Federal Issues.

The Supreme Court, in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976), recently made it clear that the abstention doctrine is rarely, to be invoked:

Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important coun-

tervailing interest." *Country of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959).

In *McRedmond v. Wilson*, 533 F.2d 757, 760 (2d Cir. 1976) this Circuit, made it clear that district courts should not normally abstain from assuming jurisdiction:

It is a pillar of federal jurisdiction that one having a bona fide claim is normally entitled as a matter of right to have the claim adjudicated by a federal tribunal and that this right may not be defeated by relegating the matter to the state court or by requiring the plaintiff to exhaust state remedies. (Citations omitted.)

The Supreme Court, in *Colorado River, supra*, summarized the three categories of cases to which the abstention doctrine is confined as follows:

(a) Abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.

* * *

(b) Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.

* * *

(c) Finally, abstention is appropriate where, absent bad faith, harrassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings antecedent to a criminal prosecution, which are directed at obtaining the closure of places exhibiting obscene films, or collection of state taxes.

424 U.S. at 814-16 (citations and footnotes omitted.) This case does not fall into any of the three categories listed by the Court.

The interpretation of and Congressional intent which gave rise to 28 U.S.C. § 5220 is under consideration in this case. Indeed, appellant challenges the very constitutionality of 28 U.S.C. § 5220. The only relevant state statute here is New York's estate tax law, and it provides that all deductions for Federal estate tax purposes shall also be deductions for state estate tax purposes and that it is to be bound by state interpretations. Thus, as Judge Cannella noted below, (Addendum at 4a), it is Federal and not state law which is to be determined here; consequently, categories (a) and (b) as quoted from *Colorado River* above do not apply.

Category (c), which suggests abstention where Federal jurisdiction seeks to restrain the "collection of state taxes," clearly does not apply here. As discussed above, the United States seeks a declaration of the propriety of the state's taxation; Judge Cannella remanded the case to the Surrogate's Court for decision. Furthermore, the taxes here have been paid by the administrator of the estate.

While Federal courts do not generally exercise jurisdiction over matters before a probate court, it is clear that Federal courts will take jurisdiction to hear limited issues. In *Markham v. Allen*, 326 U.S. 490 (1946), the Supreme Court held that a Federal district court did have jurisdiction to entertain suits which sought to establish claims against an estate in spite of the fact that the decedent's will had been admitted to probate in the California court. In reversing the Ninth Circuit which had dismissed the action on jurisdictional grounds, the Supreme Court stated as follows:

It is true that a federal court has no jurisdiction to probate a will or administer an estate,

the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 and § 24(1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters. But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits "in favor of creditors, legatees and heirs" and other claimants against a decedent's estate "to establish their claims" so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.

326 U.S. at 494 (citations omitted).

Markham reaffirmed the rule that though a Federal court may not interfere with the possession of property already in the custody of a state court, it may exercise jurisdiction, "to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." 326 U.S. at 494 (citations omitted). See *Hilton v. Mumma*, 522 F.2d 588 (9th Cir. 1975); *Bassler v. Arrowood*, 500 F.2d 138 (8th Cir. 1974), cert. denied, 419 U.S. 1116 (1975); *Harris v. Pollack*, 480 F.2d 42 (10th Cir. 1973); *Signal Properties, Inc. v. Farha*, 482 F.2d 1136 (5th Cir. 1973); *United States v. Cleavenger*, 325 F. Supp. 871 (N.D. Ind. 1971), aff'd, 517 F.2d 230 (7th Cir. 1975).

The instant case, like *Markham* and its progeny, poses no threat of interference with the state probate proceeding. Having decided the Federal questions, Judge Cannella remanded the case to New York's Surrogate's Court.

Any reliance by appellant on *United States v. City of New York*, *supra*, is misplaced as that case involved the imposition of a local property tax on property leased by the United States. The constitutionality of a Federal statute was not considered; the case did not involve a Federal statute at all. Furthermore, the local property tax there was wholly local in nature, dependent on no Federal statute for interpretation.

Appellant also relies on *Great Lakes v. Huffman*, 319 U.S. 293 (1943), for the proposition that the District Court should have abstained from jurisdiction. (Appellant's Brief at 20-21.) That case, however, involved purely private plaintiffs who opposed a tax imposed by the State of Louisiana. Commencement of the Federal action permitted the private defendants to avoid prepayment of the challenged tax, a condition precedent to suit in the Louisiana courts. Here, the tax in question has already been paid. A more fundamental distinction between *Great Lakes* and the instant case is again that *Great Lakes* did not involve a Federal statute the constitutionality and Congressional intent of which is at the heart of the suit. The instant case involves the application of a statute which appellant contends is unconstitutional and focuses on a state's right to tax property which passes to the United States by operation of Federal law.

This action was removed, as stated in paragraph 6 of the United States' Removal Petition, (Document No. 1, Record on Appeal,) "for the purpose of deciding a question of Federal law, namely, whether the State of New York is entitled to tax property which immediately vested in the United States upon the death of the decedent under 38 U.S.C. § 5220." The state has expanded the issues to include whether section 5220 is constitutional. Neither of these are probate questions; all probate questions will be resolved by the Surrogate's Court when this action is remanded following the resolution of the limited and solely Federal questions before the Federal courts.

CONCLUSION

The judgment of the District Court should be affirmed.

Dated: New York, New York
November 28, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Appellee.*

WILLIAM J. HIBSHER,
PATRICK H. BARTH,
*Assistant United States Attorneys,
Of Counsel.*

ADDENDUM

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2229

(JMC)

In the Matter of the Accounting of
ABRAHAM D. LEVY,
as Administrator of the Estate of
Charles Brown, Deceased.

CANNELLA, D.J.:

The Government's motion for summary judgment is granted.

Decedent Charles Brown served in the United States Navy from November 1918 to January 1919. On October 11, 1972 he was admitted to the Veterans Administration (VA) Hospital in Bronx, New York for treatment for a heart condition. Upon entering the hospital Brown completed an application for medical benefits which informed him that, pursuant to § 3920 of the Veterans' Benefits Act, 38 U.S.C. § 5220, "upon the death of any veteran receiving care or treatment by the Veterans Administration in any institution leaving no widow (widower), next of kin or heir entitled to inherit, all personal property, including money or balances in bank, and all claims and choses in action, owned by such veteran, and

not disposed of by will or otherwise, will become the property of the United States. . . ."¹

Decedent was discharged on November 17, 1972 but reentered the hospital on March 1, 1973. On March 5, 1973 Brown died intestate and without any next of kin or heirs entitled to inherit his property under the laws of the State of New York, his domicile.

On March 16, 1973, Abraham Levy was appointed administrator of Brown's estate. In April of 1974 Levy rendered his final accounting, which indicated that both Federal and New York estate taxes had been paid on that portion of decedent's property that vested in the

¹ Vesting of property left by decedents:

(a) Whenever any veteran (admitted as a veteran) shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, next of kin, or heirs entitled, under the laws of his domicile, to his personal property as to which he dies intestate, all such property, including money and choses in action, owned by him at the time of death and not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund (hereafter in this subchapter referred to as the "Fund"), a trust fund prescribed by section 725s(a)(45) of title 31.

(b) The provisions of subsection (a) are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Veterans' Administration in a facility or hospital. The acceptance and the continued acceptance of care or treatment by any veteran (admitted as a veteran to a Veterans' Administration facility or hospital) shall constitute an acceptance of the provisions and conditions of this subchapter and have the effect of an assignment, effective at his death, of such assets in accordance with and subject to the provisions of this subchapter and regulations issued in accordance with this subchapter.

United States under 38 U.S.C. § 5220. Thereafter, the United States removed the proceeding from the Surrogate's Court, Bronx County, to present the question of whether New York could impose its estate tax on property payable to the United States by reason of 38 U.S.C. § 5220.

Jurisdiction

The Court first must consider its jurisdiction over the instant controversy. The administrator of decedent's estate does not herein contest the propriety of removal pursuant to 28 U.S.C. §§ 1441, 1446, but he does maintain that 28 U.S.C. § 1341, prohibiting federal courts from enjoining, suspending or restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," deprives this Court of subject matter jurisdiction over the instant controversy. Aside from the fact that the Government does not seek such relief,² § 1341 does not apply to the United States as a party. *Department of Employment v. United States*, 385 U.S. 355 (1966); *United States v. Woodworth*, 170 F.2d 1019 (2d Cir. 1948).

It is also argued that, although the Court may possess jurisdiction over the subject matter of this suit, it should abstain from exercising this jurisdiction because "[t]he question of the validity of a state . . . tax is one which the state courts are peculiarly fitted to answer and which,

² The Court, after examining the record, has been unable to find any request by the United States Government to "enjoin, suspended or restrain the assessment, levy or collection of any tax." In fact, it appears that the tax in issue has already been paid. What is sought by the Government is a declaration of whether the funds in question are subject to New York Estate Tax.

therefore, a federal court should not consider." *United States v. City of New York*, 175 F.2d 75, 77 (2d Cir.), *cert. denied*, 338 U.S. 885 (1949). However, the New York Estate Tax law in question is peculiar in that, except for the tax rates, it incorporates federal estate tax law. Section 955(a) provides that

[t]he New York estate tax deduction for the estate of a deceased resident mean the deductions from his federal gross estate allowable in determining his federal taxable estate under the internal revenue code

Thus, a determination of whether decedent's property is subject to a levy of New York estate tax, a question that is dependent upon whether it is deductible under federal estate tax laws, is a determination that is within the province of the federal courts, not one that is peculiarly attuned to state court adjudication. The remaining issues in the case are purely federal in nature.

The Merits

On April 8, 1975 the Internal Revenue Service ("IRS") ruled that decedent's property vesting in the United States was deductible from decedent's gross estate for federal estate tax purposes pursuant to 28 U.S.C. § 2053.³ The United States maintains that this is the correct result. However, in that this section merely makes state law applicable to federal estate taxation with respect to certain deductions, the Court fails to see and the Government has made no attempt to explain, how such section is applicable to the case at bar.

The Government's next argument is that because property passing to the United States under 38 U.S.C. § 5220 "immediately vests" in the Government, it is not

³ On April 28, 1975 the IRS extended this ruling to all situations arising from section 5220.

subject to taxation by New York State. The Government's position, found compelling by the Court, is that decedent's property vested in the United States immediately upon his death. Any taxation of it would therefore be state taxation of federal property, a result prohibited by *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819). Such a tax would not be a tax on decedent's right to transfer his property on his death, for the property passed to the Federal Government not by bequest but by operation of federal law.

The Court finds that portion of decedent's estate which vests in the United States pursuant to 38 U.S.S. § 5220 is not subject to New York estate taxation.

The United States is directed to submit a judgment on notice within five days.

SO ORDERED.

.....
JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
July 20, 1977.

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
_____ 28th day of _____ November _____ 1977 s he served/~~an~~ copy of the
within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Louis J. Lefkowitz, Attorney General
of State of New York
2 World Trade Center
New York, New York 10047
Attn: Allan E. Kirstein
Assistant Attorney General

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

28th day of November, 1977

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978